United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: March 26, 2004

TO : B. Allen Benson, Regional Director
Region 27

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Boise Tower Associates, LLC
Cases 27-CA-18723-1, 18743-1

220-2550-8100
220-2550-9000
512-5009
554-1400
554-1433-6700
554-1450-0140

The Region submitted this Section 8(a)(1) case for advice as to whether the Act preempts a lawsuit brought against the Union.

We conclude the lawsuit does not violate Section 8(a)(1) because it is directed at Union conduct that is not protected by the Act. Accordingly, the Region should dismiss the instant charges absent withdrawal.[1] In these circumstances, we need not decide whether the Act preempts the lawsuit.

FACTS

Boise Tower Associates, LLC (BTA) is a real estate development company that planned to construct a mixed-use building in downtown Boise, Idaho. BTA hired MA Mortenson Company (Mortenson) to serve as the project's general contractor. BTA secured construction financing through Washington Capital Joint Master Trust Mortgage Investment Fund (the Lender), an investment fund comprised of union pension plan trusts.

In anticipation of a Lender requirement that union signatories perform all work on the project, BTA and Mortenson representatives met on several occasions in late August and early September 2001[2] with officials representing the Lender and with the Pacific Northwest Regional Council

---

[1] In light of our determination, the Union's request for Section 10(j) injunctive relief is inappropriate.

[2] All dates are 2001 unless otherwise indicated.

of Carpenters, Local 635 (the Union).[3] Mortenson asked the unions to provide a list of acceptable signatory subcontractors, because it had received "mixed messages" from the unions about the subcontractors Mortenson had previously submitted for their approval. The Lender advised that it would only sanction Mortenson's use of "full signatory contractors," and would only permit a project labor agreement if no signatory contractors were available.

On August 31, Union organizer Lance Fritz faxed Mortenson a list of acceptable subcontractors, and also attached a copy of the Union's Southern Idaho Master Agreement (the Master Agreement). Fritz indicated that the Union would require Mortenson to sign the Master Agreement, covering "all the work Mortenson has in Southern Idaho." The Master Agreement was effective by its terms from June 1, 2001 through May 31, 2003, automatically renewed annually thereafter, and contained a recognition clause providing that

> [t]he Employer, having received a demand for recognition by the Union and having been presented and accepting proof that the Union represents a majority of its employees, acknowledges and affirms that the Union is the sole and exclusive bargaining representative of its employees covered by the labor agreement under Section 9(a) of the...Act....

On September 7, BTA submitted a $29 million loan application to Washington Capital Management, Inc. (WCMI), which acted as the Lender's manager. Shortly thereafter the Lender issued BTA a loan commitment requiring, among other things, that all construction site work be performed by AFL-CIO building trades labor and that Mortenson be a party to bona fide AFL-CIO building trades labor union agreements covering any work to be performed by Mortenson's directly hired workforce, including an agreement with the Union.[4]

On December 28, Union Regional Manager Tommy Flynn faxed John Nowoj, Mortenson's Director of Operations,

---

[3] Officials representing the Cement Masons and Laborers locals were also present.

[4] A revised loan commitment subsequently increased the loan amount to $33 million and required that Mortenson have a signed agreement with the Union and provide the Lender with a copy of a "complete executed compliance agreement" with the Union.

another copy of the Master Agreement. According to Flynn, Nowoj called on December 31 and asked Flynn to delete the Section 9(a) recognition language. Flynn refused, stating that the Union was unwilling to give Mortenson a "sweetheart deal" favoring it over other Boise-area contractors, and adding that the issue was not negotiable.

Following further telephone conversations between Mortenson and the Union, Nowoj faxed a proposed Memorandum of Agreement (MOA) to the Union on March 18, 2002. The MOA largely incorporated the Master Agreement's terms, but provided that it would be a Section 8(f) agreement limited to the BTA project. On March 20, 2002, the Union countered with a proposed Memorandum of Understanding (MOU) that left the Section 9(a) language in place and called for the same term as the Master Agreement.

By letter dated March 27, 2002, Mortenson notified BTA that it had "reached an impasse" with the Union because of its insistence on terms not required by Mortenson's contract with BTA, which tracked the language of BTA's loan commitment verbatim. The following day, BTA wrote the Lender's counsel, enclosing copies of Mortenson's March 18 MOA and March 27 letter. BTA requested that WCMI inform the Union that its demands exceeded BTA's financing requirements and that Mortenson would not agree to them. The letter cautioned that the Union's intransigence might jeopardize any union labor performing work on site, because if the loan did not close BTA would be forced to seek alternate financing. It is unclear whether WCMI responded to BTA's letter.

By letter dated April 10, 2002, BTA apprised WCMI that Mortenson was unable to reach an agreement with the Union. BTA also informed WCMI that it had instructed Mortenson to complete the work previously authorized and then suspend all jobsite activity.

Mortenson and Union officials met again on May 23, 2002. Mortenson's representatives said they wanted any agreement to be limited to work performed by its Seattle operating group, and would consider signing the Five Basic Crafts Agreement (the Five Crafts Agreement, covering a smaller geographic area than the Master Agreement, and mostly used for heavy and highway construction projects) instead of the Master Agreement, as a compromise. After the meeting, the Union faxed Mortenson a proposal incorporating provisions from the Five Crafts Agreement, including Section 9(a) recognition language. The Union's proposal also required Mortenson to remain bound by any extension or amendment to the Five Crafts Agreement or its successor, and to waive its right under Section 8(f) to

terminate the Agreement in the event of a hiatus between the expiration of the Five Crafts Agreement and execution of a successor agreement.

On July 15, 2002 the Union rejected Mortenson's counterproposal. As a result, Mortenson withdrew as general contractor on the BTA project. BTA was unable to find another general contractor or to secure alternate financing.

On March 5, 2003, BTA filed a lawsuit in Idaho state court against the Lender, WCMI, and the Union. In relevant part, BTA's complaint alleged that the Union violated the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1962, and tortiously interfered with BTA's contractual relationships by frustrating and impeding BTA's ability to secure the loan funds. The Union's answer raised five affirmative defenses, including that the claims against it were "barred by principles of federal labor law preemption" because the bargaining was protected activity. The Union removed the suit to federal district court based upon the RICO count, but to date has not sought dismissal based upon any of its affirmative defenses.[5]

ACTION

We conclude that the Section 8(a)(1) charges should be dismissed, absent withdrawal, because the lawsuit challenges Union conduct that is not protected by the Act.

BTA's suit attacks the Union's insistence -- from the outset of negotiations -- that Mortenson sign an unlawful Section 9(a) prehire agreement recognizing the Union as the exclusive majority bargaining representative of its employees rather than a lawful Section 8(f) prehire agreement.[6] Thus, the Union's initial August 31 proposal

---

[5] On December 30, 2003, BTA voluntarily dismissed its RICO claim. Mortenson (which BTA added as a defendant) has moved to dismiss the suit on various grounds or, in the alternative, to remand the case to state court since the RICO count has been dismissed. The Lender opposes Mortenson's remand motion, and the Union intends to oppose a remand but has yet to file its opposition. Discovery, which had been ongoing, is stayed pending rulings on these outstanding matters.

[6] See generally J & R Tile, 291 NLRB 1034, 1036 (1988) (to establish voluntary Section 9(a) recognition in the construction industry, there must be evidence that the union unequivocally demanded recognition as the employees' Section 9(a) representative and that the employer

contained a Section 9(a) recognition clause; when on December 31 Nowoj asked Union Regional Manager Flynn to delete such language, Flynn refused, adding that the issue was non-negotiable; and every Union proposal thereafter identified the Union as a Section 9(a) representative. The Union's unwavering insistence that Mortenson sign an unlawful Section 9(a) prehire agreement, if anything, constituted bad faith bargaining within the meaning of Section 8(b)(3), and certainly was not protected activity. We therefore conclude that BTA's lawsuit does not violate Section 8(a)(1), and the Region should dismiss the instant charges absent withdrawal.[7]

B.J.K.

---

unequivocally accepted it as such, based on a contemporaneous showing of union support among a majority of the employees in an appropriate unit); Golden West Electric, 307 NLRB 1494, 1495 (same). In contrast, Section 8(f) permits an employer engaged primarily in the building and construction industry to execute a prehire agreement with a union covering employees engaged in the building and construction industry without regard to the union's majority status.

[7] We need not decide whether the suit is preempted because, even if it is, the suit does not violate Section 8(a)(1). See Bakery Workers Local 6 (Stroehmann Bakeries), 320 NLRB 133, 138 (1995), cited in Webco Industries, 337 NLRB 361, 363 (2001) (a preempted lawsuit that does not restrain or coerce employees in the exercise of their Section 7 rights is not an unfair labor practice).